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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5147 OF 2024

Pandurang Shankar KharpudePetitioner

Vs.

Shantabai Vishnu Hivarkar and OrsRespondents

Mr. Vilas Tapkir for the petitioner
Mr. S. G. Deshmukh a/w Mr. Vignesh Ashokan i/b Mr. Sachin H.
Deokar

CORAM : GAURI GODSE, J.

DATE : 13th AUGUST 2025

ORDER:

1. This petition is filed by the original defendant no. 1 to challenge the order dismissing his application for condonation of delay in filing an application for restoration of the first appeal in the District Court. The first appeal was filed to challenge the Judgment and Decree for partition and separate possession passed in favour of respondent nos. 1 to 3 on 5th July 2007.

2. The original plaintiffs are sisters and the defendants are brothers. The plaintiffs-sisters filed the suit for partition and separate possession. The claim for partition and separate possession was accepted by defendant no. 2, i.e. one of the

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two brothers. The present petitioner though served, failed to appear in the suit. The suit was decreed on 5th July 2007 granting 1/6th share each to the plaintiffs and both the defendants. This decree was challenged by the petitioner by filing an appeal in the District Court. The appeal was dismissed for default on 21st August 2014. Hence, the petitioner filed application for restoration. The restoration application was dismissed in default on 20th June 2022 by recording reasons that the petitioner and his advocate were absent since long and the application had remained pending since 2015. The petitioner, therefore, filed an application for restoration of restoration application. There was delay in filing this application. Hence, the petitioner prayed for condonation of delay by filing a separate application. This delay condonation application is rejected by the impugned order dated 2nd December 2023.

3. Learned counsel for the petitioner points out that without considering any evidence, the Trial Court passed the Decree for partition and separate possession. He submits that the petitioner is 73 years old and thus, was unable to attend the Court and thus, considering his age, the application for

condonation of delay needs to be allowed as the applicant would be entitled to be heard on merits. To support his submissions, learned counsel for the petitioner relies upon decisions of the Hon'ble Apex Court in the case of ***Inder Singh Vs. State of Madhya Pradesh***¹. He submits that in decision of ***Inder Singh***, the legal principles are settled by the Hon'ble Apex Court by observing that while condoning the delay, a major aspect which has to be kept in mind is that, if in a particular case, the merits have to be examined, it should not be scuttled merely on the basis of limitation. He submits that even in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others***², the Hon'ble Apex Court held that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay. He submits that in the present case, the petitioner is not given an opportunity to contest the suit on merits and thus, this Court has to take a practical and pragmatic approach by condoning the delay and permitting the petitioner to contest the proceedings on merits.

4. Learned counsel for the respondents strongly opposes

¹ 2025 SCC OnLine SC 600

² (2013) 12 Supreme Court Cases 649

the prayers in the petition. Learned counsel for the respondents submits that only to defeat the rights of the sisters to get the separate share as per the decree for partition, the petitioner has deliberately kept the proceedings pending. He submits that after the decree for partition and separate possession was passed, the measurements were carried out on 13th November 2017 and the actual handing over of possession has remained pending only because the petitioner has kept the proceedings for restoration of his appeal pending without taking any steps for arguing the petition on merits. He points out that even on earlier occasions, opportunity was given to the petitioner to put an end to the dispute amicably. However, there was no response from the petitioner. Hence, the petition remained pending and the respondents-plaintiffs were unable to get the possession as per the decree for partition and separate possession.

5. On merits of the impugned order, the reasons given for condonation of delay, learned counsel for the respondents points out that vague reasons are mentioned in the application. He submits that the application for restoration of the first appeal was kept pending by the petitioner since 2015 and thus,

ultimately, the same was dismissed on 20th June 2022. He submits that in the absence of any justifiable and reasonable grounds for condonation of delay, the learned District Judge has rightly rejected the application for condonation of delay.

6. I have perused the papers of the petition. Though, the partition decree is dated 5th July 2007, the respondents were unable to execute the same as the petitioner kept the first appeal pending without taking any steps. Hence, the District Court, by a reasoned order, dismissed the application in default by observing that the applicant and his advocate remained absent since 2015. The dates in the Rozanama were referred to by the learned Judge and held that the application was on earlier dates was listed for dismissal, however, no steps were taken to get the application decided. Hence, the applicants had not shown any interest in the application for restoration and thus, it was dismissed on 20th June 2022.

7. In the application for condonation of delay, in applying for restoration of the application, the learned Judge has in detail examined the reasons given by the present petitioner. Though opportunity given, the petitioner did not lead any evidence to support his grounds raised for condonation of delay. The

learned Judge has referred to all the particulars of the dates when the petitioner remained absent and despite giving reasonable opportunities, did not take any steps to get the application heard for restoration of his appeal. The reasons given by the petitioner regarding he being busy in agricultural work was not accepted as justifiable and reasonable ground to condone the delay. The reasons for condonation of delay are therefore, in detail examined by the learned Judge while dismissing the application.

8. The fact that the respondents-sisters were deprived of getting possession as per the decree for partition and separate possession in the year 2007 would also be an important factor to be considered while deciding this petition. A perusal of the record and the relevant dates reveal that there is substance in the arguments raised on behalf of the respondents-plaintiffs that only to defeat their rights to get possession as per the partition decree, the petitioner on one or other ground, kept the litigation pending. Thus, considering the peculiar facts and in the absence of reasonable and justifiable ground to condone the delay, I do not see any any reason to interfere with the impugned order.

9. In the decision of the Hon'ble Apex Court in the case of *Inder Singh*, the issue before the Court was with regard to the application seeking condonation of delay in filing the second appeal by the respondent State. Hence, the observations and the legal principles settled in the said decision would not be of any assistance to the petitioners while seeking condonation of delay in filing an application for restoration of restoration application for restoring the first appeal challenging the decree for partition and separate possession. In the decision of the Hon'ble Apex Court in the case of *Esha Bhattacharjee*, the legal principles settled by the Hon'ble Apex Court would squarely apply to the facts of the present case in favour of the respondents. The Hon'ble Apex Court held that lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact while deciding the application for condonation of delay. It is further held that it has to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice. The Apex Court further held that the concept of liberal approach has to encapsulate the conception

of reasonableness and it cannot be allowed a totally unfettered free play. Hence, the Apex Court further held that the conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach. In the peculiar facts of the present case, where the petitioner has succeeded to defeat the rights of the plaintiffs in getting the fruits of the partition decree which was passed in 2007, the legal principles settled in the case of ***Esha Bhattacharjee*** are applicable in favour of the respondents-plaintiffs.

10. Hence, in the exercise of the discretionary jurisdiction under Article 227 of the Constitution of India, I do not see any reason to interfere with the impugned order. Writ Petition, is therefore, dismissed.

11. At this stage, learned counsel for the petitioner seeks extension of interim relief which was operating in this petition. Learned counsel for the respondent opposes such extension on the ground that the actual handing over of possession has

remained stayed only because the petitioner had kept this proceeding pending. He points out that for getting this petition listed, respondents had to take steps.

12. In the facts and circumstances of the case, I do not see any reason to extend the interim protection. Hence, the request is rejected.

[GAURI GODSE, J.]